No. 83-952

In The

Supreme Court of the United States

October Term 1983

UNITED STATES OF AMERICA,

Petitioner,

vs.

JOHN R. WILSON, et al.,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR JOHN R. WILSON, et al. IN OPPOSITION

ROBERT J. BECKER and
DONALD J. BURESH
3535 Harney Street
Omaha, NE 68131

THOMAS R. BURKE and
LYMAN L. LARSEN
10306 Regency Parkway Dr.
Omaha, NE 68114

Counsel for John R. Wilson, Charles E. Lakin, Florence Lakin and Harold Jackson

PETER J. PETERS
233 Pearl Street
Council Bluffs, IA 51502

Counsel for RGP, Inc. and Otis Peterson

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

TABLE OF AUTHORITIES—Continued

No. 83-952

In The

Supreme Court of the United States

October Term 1983

UNITED STATES OF AMERICA,

Petitioner,

vs.

JOHN R. WILSON, et al.,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR JOHN R. WILSON, et al. IN OPPOSITION

STATEMENT

The respondents generally accept the petitioner's Statement with respect to the history of the case. We disagree, however, with certain matters asserted by the petitioner in its Statement, and we would call attention to certain facts not included in that Statement.

1. The earlier opinions of the district court[1], the court of appeals[2] and this Court[3], have recognized that the respondents and their predecessors occupied the Barrett Survey area for many years prior to this litigation which began in 1975 when the respondents were removed from possession by an injunction obtained by the Omaha Indian Tribe. The district court made the following findings with respect to the occupancy.

> Although these factors did not influence the decision of the Court in these findings, the Court feels compelled to comment upon the history of the activities of the defendants and their predecessors as it relates to the Blackbird Bend area. The evidence is without dispute that the Omaha Indian Tribe has not been in either possession or occupancy of the land within the Barrett Survey Meander since 1912 or before. There is considerable evidence in the record that the defendant's predecessor in title, Joe Kirk, came upon the land in approximately 1915 and commenced to clear and farm such areas of it as could be made farmable. From that time forward, the land was in the process of being cleared, drained, leveled, and improved for agricultural purposes by Kirk and others. There is in evidence in this case a certified copy of the Judgment and Decree of Cause No. 10093, District Court of Iowa in and for Monona County, entitled *George D. Whitney v. Joseph A. Kirk and Bertha Kirk,* wherein the Iowa District Court on November 30, 1928, concluded that Joseph A. Kirk was the owner of the Northeast Quarter of Section 19, Township 84 North, Range 46 West, lying upon the high bank, and that all land lying adjacent

---

1. *United States v. Wilson,* 433 F.Supp. 57, 69, 86-87 (N.D. Iowa 1977).

2. *Omaha Indian Tribe v. Wilson,* 575 F.2d 620, 622 (8th Cir. 1978).

3. *Wilson v. Omaha Indian Tribe,* 442 U.S. 653, 659 (1979).

thereto was accretion land and as such, Kirk was entitled to title and possession of all lands lying south of a line commencing at the southwest corner of the Northeast Quarter of Section 19, Township 84, Range 46, and running in a southwesterly direction at right angles to the bed of the Missouri River. . . . (Exhibit W-CC). . . . Also in evidence, are Wilson Exhibits AA and BB, which are quiet title actions brought by the defendants or their predecessors in interest, of substantially all of the land with the Barrett Meander Survey, which quieted title to the riparian owners in 1962 and 1963 as against all persons except the United States. Finally, there is evidence in this case Exhibit W-D3 which is the Certificate of the Monona County Treasurer, showing payment of the taxes on the land within the Blackbird Bend by the defendants or their predecessors, since said land was placed upon the tax rolls.

There is no evidence of any possession by the Omaha Indian Tribe or of any improvements to the land by the Omaha Indian Tribe at any time even since temporary possession was granted by this Court by Temporary Injunction in 1975.

United States v. Wilson, 433 F.Supp. 57, 86, 87 (N.D. Iowa 1977).

These findings were not disturbed by the court of appeals or this Court.[4]

---

4. In *Omaha Indian Tribe v. Wilson*, 575 F.2d at 622, the court of appeals noted "From at least the 1940's until April 2, 1975 the defendants and their predecessors in title had occupied, cleared and cultivated the land in dispute."

This Court also commented on the occupancy of the Barrett Survey land by respondents:

> As the area, now on the Iowa side, dried out, Iowa residents settled on, improved, and farmed it. These non-Indian owners and their successors in title occupied the land for many years prior to April 2, 1975, when they were dispossessed by the Tribe, with the assistance of the Bureau of Indian Affairs.

Wilson v. Omaha Indian Tribe, 442 U.S. at 659.

The record in this case is clear that the respondents and their predecessors in interest were good faith occupiers of the land under color and claim of title and that during their occupancy they made valuable improvements to the land, converting it from swamp and timber land into valuable farm land.[5]

2. The petitioner in the opening paragraph of its Statement says: "This case concerns the jurisdiction of the federal courts to entertain counterclaims seeking monetary relief against the United States when the government initiates a quiet title action to establish ownership and regain possession of land belonging to an Indian tribe." Pet. 2.

This is not an accurate interpretation of either the position of the respondents with respect to the matter of improvements or the holding of the court of appeals on this issue. The obligation of the petitioner to reimburse respondents for the improvements made to the Barrett Survey land is based upon the equitable doctrine that "one who seeks equity must do equity". The court of appeals applied the following rules in holding in favor of the respondents:

> In a quiet title action where the plaintiff seeks the equitable remedy of a decree quieting title in himself, it is generally accepted that the plaintiff must do equity by reimbursing the defendant for the value of improvements as a condition precedent to

---

5. The district court noted that ". . . a substantial portion was cleared of trees, leveled, fenced, drained, roads built, and cultivated. It is now a valuable and productive tract of farm ground, as evidenced by the purchase of 2,180 acres by defendant Wilson in 1972 by Warranty Deed for a consideration valued at $1,685,000 . . ." 433 F.Supp. at 69.

> his right to relief. [citations omitted] . . . We see no reason why on the facts of this case the United States should be excused from the application of this equitable doctrine. It is well established that the United States is subject to general principles of equity when seeking an equitable remedy [citations omitted]. Pet. App. 21a, 22a.

The court of appeals rejected the petitioner's claim of sovereign immunity stating: "Because the duty to pay for the value of improvements is an element of the government's own claim, a condition precedent to the right of the United States to recover, we find the doctrine of sovereign immunity is inapplicable." Pet. App. 22a, 23a.

This passage states what we believe to be the essence of the matter—that the obligation of the petitioner to pay for the value of the permanent improvements made to the land is part of the petitioner's own case. That obligation does not arise by virtue of any counterclaim asserted by the respondents.

3. The petitioner twice states that no further title issues remain as to the Barrett Survey area. Pet. 2, 5. These statements also demonstrate the petitioner's misconception of the equitable nature of the improvements issue since, as the court of appeals correctly stated, ". . . the duty to pay for the value of improvements is an element of the government's own claim. . . . " Pet. App. 22a, 23a. The title question cannot ultimately be resolved without a resolution of this matter.

4. The petitioner states: "As an alternative basis for recovery, respondents argued that Nebraska law entitled them to recover for improvements, relying on the Nebraska Occupants and Claimants Act, Neb. Rev. Stat. §§ 76-301 to 76-311 (reissue 1981) . . ." Pet. 6.

We have consistently stated in our briefs in the district court and in the court of appeals that the petitioner's obligation to pay for improvements is based upon general principles of equity which federal courts sitting in equity have traditionally applied in similar situations. We have never contended that the Nebraska Occupying Claimants Act applies directly to this dispute. We have maintained, however, relying on *Leighton v. Young*, 52 F. 439 (8th Cir. 1892), that the court in exercise of its equitable powers and in fashioning a decree in this case should look to and be guided by the substantive rules of the Nebraska Occupying Claimants Act[6].

---

6. *Leighton* was a dispute over ownership of Nebraska land. It involved two separate actions. In the first action the owner sued the occupying claimant in ejectment and obtained a jury verdict and judgment for possession. In the second action the occupying claimant sued in equity to enjoin the owner from being placed in possession by a writ of execution until the owner had paid the value of improvements made to the land by the occupant. The district court in the second action appointed a special master who made an appraisal and report in general conformity with the Nebraska Occupying Claimants Act. The court of appeals upheld that procedure noting the equitable origin and basis of the Act but noting also that, while its substantive provisions should be followed, the federal court need not conform to the exact procedures of the Act.

> The case being one of equitable cognizance, the federal court, sitting in chancery, will execute the law by the customary chancery methods and modes of proceeding, and, if they are not adequate to the purpose, will devise methods that are. The equity practice in the courts of the United States is not regulated by the state statutes. Nevertheless, in the exercise of its chancery powers, the court below might have conformed to the state practice by directing the marshal to summon three appraisers, and this probably would have been the better way, as it is desirable, when a court of the United States is enforcing a right created by state statute, to follow, as near as may be, the practice prescribed by the state statute for the enforcement of the right secured thereby. But it was equally within the discretion of the court to appoint one or more commissioners, or to refer the matter, as was done, to a master.
>
> 52 F. at 443.

ARGUMENT

Summary of Argument

In ruling as it did on the improvements issue the court of appeals applied the very fundamental equity doctrine that "one who seeks equity must do equity". The court's ruling is consistent with a long line of decisions holding the United States subject to that principle when it seeks equitable relief. It does not conflict with any of the decisions of this Court dealing with the issue of the sovereign immunity of the United States. Nothing in the circumstances of that ruling warrants review by this Court.

Reasons For Denying the Petition

1. Courts of equity have traditionally required the true owner, as a condition precedent to a decree quieting title in his favor, to reimburse a good faith occupant for the value of the permanent improvements which the occupant has made to the land. The courts have done so under the doctrine that "one who seeks equity must do equity".[7] That doctrine has been recognized in the de-

---

7. One of the earliest and most often cited federal cases to discuss the principle is *Bright v. Boyd*, 4 Fed. Cas. 127 (C.C. Me. 1841) and 4 Fed. Cas. 134 (C.C. Me. 1843). In *Bright*, the true owner established a superior title in an action at law. Thereafter, the occupant brought an original bill in equity to establish his right to recover the value of buildings and other improvements made to the property. The Court granted the bill, and in the two opinions, Justice Story provides a lucid explanation of the equitable basis for the decision.

> So, if the true owner of an estate holds only an equitable title thereto, and seeks the aid of a court of equity to enforce that title, the court will administer that aid only upon

(Continued on following page)

cisions of this Court. In *Williams v. Gibbes*, 58 U.S. 535, 538 (1858) the Court said:

> Another principle which we think applicable to this case is to be found in a class of cases where a bona fide purchaser, for a valuable consideration, without notice, has enhanced the value of the property by permanent expenditures, and has been subsequently evicted by the true owner, on account of some latent informity in the title. It is well settled, if the true owner is obliged to come into a court of equity to obtain relief against the purchaser, the court will first require reasonable compensation for such expenditures to be made, upon the principle that he who seeks equity must first do equity.

(Continued from previous page)

the terms of making compensation to such bona fide possessor for the amount of his meliorations and improvements of the estate, beneficial to the true owner. See, also, 2 Story, Eq. Jur. § 799b, and note; Id. §§ 1237, 1238. In each of these cases the court acts upon an old and established maxim in its jurisprudence, that he who seeks equity, must do equity.

4 Fed. Cas. at 133.

I wish, in coming to this conclusion, to be distinctly understood as affirming and maintaining the broad doctrine, as a doctrine of equity, that, so far as an innocent purchaser for a valuable consideration, without notice of any infirmity in his title, has, by his improvements and meliorations, added to the permanent value of the estate, he is entitled to a full remuneration, and that such increase of value is a lien and charge on the estate, which the absolute owner is bound to discharge, before he is to be restored to his original rights in the land. This is the clear result of the Roman law; and it has the most persuasive equity, and, I may add, common sense and common justice, for its foundation.

4 Fed. Cas. at 135.

See, generally: 57 ALR 2d 263.

And, in *Searl v. School District No. 2*, 133 U.S. 553, 561 (1890) the Court said:

> The civil law recognized the principle of reimbursing to the bona fide possessor the expense of his improvements if he was removed from his possession by the legal owner, by allowing him the increase in the value of the land created thereby. And the Betterment Laws of the several States proceed upon that equitable view. The right of recovery, where the occupant in good faith believes himself to be the owner, is declared to stand upon a principle of natural justice and equity, and such laws are held not to be unconstitutional as impairing vested rights, since they adjust the equities of the parties as nearly as possible according to natural justice; and in its application as a shield of protection, the term "vested rights" is not used in any narrow sense, but as implying a vested interest of which the individual cannot be deprived arbitrarily without injustice. The general welfare and public policy must be regarded, and the equal and impartial protection of the interests of all.

The equitable doctrine applied by the court of appeals in the instant case is one which is firmly established in the equity jurisprudence of the federal courts. That doctrine would apply without question if the title dispute in this case were solely between private litigants.

2. Sovereign immunity does not shield the United States from the obligation to do equity when it seeks equity.[8] Lower federal court decisions to that effect[9] have

---

8. *Brent v. The Bank of Washington*, 10 Pet. 596; *Lacy v. United States*, 216 F.2d 223 (5th Cir. 1954), *Jacobs v. United States*, 239 F.2d 459 (4th Cir. 1956), *cert. denied* 353 U.S. 904 (1957); *Ehrlich v. United States*, 252 F.2d 772 (5th Cir. 1958); *United States v. Desert Gold Mining Co.*, 448 F.2d 1230 (9th Cir. 1971); *United States v. Belt*, 47 F.Supp. 239 (D.C. Col. 1942), *vacated*, 319 U.S. 521, *aff'd*, 142 F.2d 761 (D.C. Cir. 1944). *United States v. Fallbrook Pub. Util. Dist.*, 193 F.Supp. 342 (S.D. Cal. 1961).

9. E. g., *Lacy v. United States, supra*, note 8; *United States v. Belt*, supra, note 8.

cited this Court's decision in *Luckenbach S.S. Co., v. Norwegian Barque Thekla,* 266 U.S. 328, 339-340, (1924), an admiralty case involving a cross libel against a ship requisitioned by the United States, in which the Court stated:

> When the United States comes into court to assert a claim, it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where, but for its sovereignty, it would be liable, does not destroy the justice of the claim against it.

When the United States invokes the equity powers of the federal courts to protect or preserve its interests in property, those courts have the authority to withhold relief until the United States performs the equitable conditions precedent to obtaining that relief.[10]

---

10. In *Lacy v. United States, supra,* note 8, the court would not order the removal of buildings from an easement claimed by the United States until the United States paid just compensation.

> The Government when applying for relief in a court of equity is as much bound to do equity as is a private litigant. United States v. Belt, D.C., 47 F.Supp. 239, vacated 319 U.S. 521, 63 S.Ct. 1278, 87 L.Ed. 1559, affirmed 79 U.S. App. D.C. 87, 142 F.2d 761; United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 338, 26 S.Ct. 282, 50 L.Ed. 499; Daniell v. Sherrill, Fla., 48 So.2d 736, 737, 23 L.R.A.2d 1410.
>
> "When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter." United States v. The Thekla, 266 U.S. 328, 339, 340, 45 S.Ct. 112, 113, 69 L.Ed. 313. It is true that that principle cannot be pressed to the extent of waiving the sovereign immunity to suit by way of counterclaim. United States v. Shaw, 309 U.S. 495, 502, 60 S.Ct. 659, 84

(Continued on following page)

3. The petitioner contends that the decision of the court of appeals is in conflict with this Court's decisions, principally, *United States v. Shaw*, 309 U.S. 495 (1940) and *United States v. United States Fidelity & Guaranty*

(Continued from previous page)

L.Ed. 888; In re Greenstreet, Inc., 7 Cir., 209 F.2d 660, 666; Oyster Shell Products Corp. v. United States, 5 Cir., 197 F. 2d 1022. The Government, however, is still bound to do equity and, as a condition precedent to relief in this case, either to agree upon and pay to the property owner such compensation as it may owe him or, failing such agreement, to file the necessary proceedings for the ascertainment of such compensation.

216 F.2d at 225-226.

In *Jacobs v. United States, supra,* note 8, the court would not order delivery of construction drawings or records to the United States until the United States paid for the work performed.

In imposing as a condition of the decree that the government pay to the contractor the sum of $20,072.91, being the amounts found by the court to be due the contractor under the contract and for guarding for the government the secrecy of the records and drawings, the court was merely applying the well settled principle that he who seeks equity must do equity, a principle binding upon the government, as well as upon individuals. United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 26 S.Ct. 282, 50 L.Ed. 499; Lacy v. United States, 5 Cir. 216 F.2d 223.

239 F.2d at 461.

In *Ehrlich v. United States,* supra, note 8, the court would not rescind a conveyance by the United States on grounds of fraud by the grantee until the United States refunded the purchase price to the grantee.

This is a suit in equity to rescind a sale on the ground of fraud. The general rule governing such cases is that he who seeks equity must do equity; that one cannot rescind a sale, even for fraud, without first making restitution of the purchase price. Thackrah v. Haas, 1886, 119 U.S. 499, 7 S.Ct. 311, 30 L.Ed. 486; Grymes v. Sanders, 1876, 93 U.S. 55, 23 L.Ed. 798; Neblett v. Macfarland, 1875, 92 U.S. 101,

(Continued on following page)

Co., 309 U.S. 506 (1940) which held that, absent an authorizing statute, the sovereign immunity of the United States precludes counterclaims against the United States for monetary judgments. The differences, however, between those cases and the instant case are apparent.

(Continued from previous page)

23 L.Ed. 471. The party seeking rescission must undertake to perform whatever conditions the Court may decide to be equitable, if it eventually declares the right of rescission.

252 F.2d at 776.

In *United States v. Desert Gold Mining Co.*, supra, note 8, the court would not cancel a conveyance by the United States until the United States made payment to a good faith mortgagee without notice of defects.

In issuing that opinion [the court's prior opinion at 433 F. 2d 713 holding a mortgage to be a valid lien as against the Government] we believed, *inter alia*, that since the Government had sought the intervention of equity, it was in no position to protest its corresponding obligation to do equity in order to obtain the equitable relief that it sought.

448 F.2d at 1231.

In *United States v. Belt*, supra, note 8, the court held that the United States could not reclaim title to certain parcels of land, because of allegedly invalid conveyances, unless it made compensation in accordance with the terms of the conveyances.

I have further concluded that granting arguendo, plaintiff's position in the case at bar should be found to be correct in point of fact, nevertheless the Government is not in a position to urge this point before this court of equity without at least an offer to award the defendants compensation equal to the value of the land.

* * *

It cannot be questioned that the Government, when applying for relief in a court of equity, is as much bound to do equity as a private litigant. Brent v. Bank of Washington, 10 Pet. 596, 614, 9 L.Ed. 547, 555; McKnight v. United States, 98 U.S. 179, 25 L.Ed. 115; United States v. Detroit T. & L. Co., 200 U.S. 321, 26 S.Ct. 282, 50 L.Ed. 499.

47 F.Supp. at 240-241.

The counterclaims in *Shaw*, and *U.S.F.&G. Co.*, sought affirmative monetary judgments. The merits of the counterclaims were independent of the merits of the claims of the United States. In each case the judgment sought on the counterclaim would be res judicata in any subsequent proceedings, even if there could be no execution on the judgment.

In contrast, the rule requiring the true owner to reimburse a good faith occupant for improvements originates in the desire of courts of equity to do complete justice with respect to the subject matter. In the language of the court of appeals in the instant case, the obligation to make reimbursement for improvements under the doctrine that "he who seeks equity must do equity" is "an element of the government's own claim" Pet. App. 21-22a.

This Court's decision in *The Thekla*, 266 U.S. 328 (1924), establishes the basis upon which the courts may require the United States to accept whatever obligations are incidental to the accomplishment of complete justice with regard to the subject matter in controversy. It is upon that basis that the federal courts, uniformly, have seen fit where appropriate to impose equitable conditions upon the granting of equitable relief to the United States.[11] The Fourth Circuit Court of Appeals in *Jacobs v. United States*, 239 F.2d 459, 461-462 (4th Cir. 1956), *cert. denied*, 353 U.S. 904 (1957) states the matter succintly:

> We quite agree that the fact that the court is granting relief to the government does not authorize it to

---

11. See cases cited note 8 *supra*.

> entertain counterclaims which amount to suits which Congress has not authorized. United States v. Shaw, 309 U.S. 495, 502, 60 S.Ct. 659, 84 L.Ed. 888. This, however, is a very different thing from conditioning the granting of equitable relief upon the doing of justice with respect to the subject matter of the relief granted.

The decision of the court of appeals does not conflict with this Court's decisions in *Shaw, and U.S.F.&G. Co.*

4. The petitioner contends that this Court's decisions in *Pan American Petroleum & Transport Co. v. United States,* 273 U.S. 456 (1927) and *Heckman v. United States,* 224 U.S. 413 (1912) stand for the proposition that general principles of equity will not apply to frustrate public policy. The petitioner argues that the ruling of the court of appeals on the improvements issue in the instant case is in conflict with those decisions. Pet. 12-14.

Pan American, and *Heckman,* are, however readily distinguishable. The refusal of this Court in *Pan American* to require the United States to pay for what it received under the leases and contracts which were declared invalid in that case must be viewed against the background of the massive fraud, conspiracy and bribery of the Teapot Dome scandal.[12]

---

12. In refusing equitable relief to the defendants the Court stated:

> The contracts and leases and all that was done under them are so interwoven that they constitute a single transaction not authorized by law and consummated by conspiracy, corruption and fraud. . . . The Petitioners stand as wrongdoers, and no equity arises in their favor to prevent granting the relief sought by the United States.

273 U.S. at 509.

Similarly, in *Heckman*, this Court refused to require the United States to refund the purchase price as a precondition to obtaining relief in the form of cancellation of conveyances of restricted lands made by Indian allottees. The Court noted that those who dealt with the Indians knew or should have known of the restrictions.[13]

The Court in *Pan American*, cited two other cases, *United States v. Trinidad Coal & Coking Co.*, 137 U.S. 160 (1917) and *Causey v. United States*, 240 U.S. 399, (1916) as examples of other situations where it would refuse to require the United States to make restitution as a condition to obtaining the cancellation of patents.

In all of these cases, however, there was either fraudulent conduct or at least knowingly wrongful conduct by the parties seeking restitution through the court's equitable powers. By contrast, the equitable doctrine requiring payment for improvements as a precondition to a quiet title decree presupposes the innocence and good faith of the occupation and the absence of intentional wrongdoing. The application by the court of appeals of that doctrine in the instant case is not in conflict with

---

13. In *Heckman*, the Court said:

> The restrictions [against alienation of allotted Indian lands] were set forth in public laws, and were matters of general knowledge. Those who dealt with the Indians contrary to these provisions are not entitled to insist that they should keep the land if the purchase price is not repaid, and thus frustrate the policy of the statute.
>
> 224 U.S. at 447.

The Court also noted that the very improvidence of the Indian allottees, which the restrictions were intended to protect against, would, as a practical matter, mean in most cases that the allottee would not be able to make restitution and recover the land.

Pan American, Heckman, and the other cases discussed above.

5. The petitioner maintains that it is improper to require it to pay for the value of the improvements to the land because it has not attempted to claim rents and profits. Pet. 9, 15. However, there is nothing in the decision of the court of appeals which forecloses an inquiry into the entitlement of the United States or the Tribe to rents and profits. The Tribe in fact has a pending claim for trespass damages. The district court on remand and in the exercise of its equity powers has complete authority to resolve all further claims involving the Barrett Survey area including the rights of the United States and the Tribe, if any, for rents and profits and the corresponding rights of the respondents to recover for the value which they have added to the land during their occupancy. The court of appeals noted this authority and urged the district court and the parties to utilize it to end this litigation:

> It is "well settled that the court may finally determine as between the parties in a quiet title action all of the conflicting claims regarding any estate or interest in the property." *Hendershott v. Shipman,* 231 P.2d 481, 483 (Cal. 1951). *Cf Bjornstad v. Fish,* 87 N.W.2d 1, 8 (Ia. 957). The United States has heretofore made no claim for recovery of rents and profits. However, the Tribe brought an action for ejectment and for trespass damages, which was severed. We urge the parties and the district court to consider consolidation of all remaining claims arising out of the possession or lack of possession of the Barrett Survey area during the period in controversy, so that the claims may be resolved in the most judicially efficient manner.
>
> Pet. App. 23a.

6. The petitioner argues that the decision of the court of appeals will seriously affect the ability of the United States to protect the property interests of Indian tribes. Pet. 15-18. We believe that the petitioner overstates the matter.

In exercising its equitable powers a court may fashion its decree to suit the particular circumstances of the case before it. The court of appeals in ruling in favor of the respondents stated: "We see no reason why *on the facts of this case* the United States should be excused from the application of this equitable doctrine". Pet. App. 22a. (emphasis added).

The "facts of this case" involve an unusual and perhaps unique set of circumstances. The respondents have been divested of land which they had every right to believe was Iowa riparian land to which they had good title. Since 1912 they or their predecessors drained, cleared and cultivated that land, as the land emerged on the Iowa side of the river, and brought quiet title actions to establish their titles in the honest belief that it was not subject to claims by the United States or the Tribe.

Although the land in question lies immediately across the river from the Omaha Reservation, such that the occupation of the respondents and their predecessors was obvious to the Tribe, the petitioner and the Tribe stood mute for a period of almost seventy years, apparently never believing themselves that they had any interest in these lands. In the end, the respondents face the loss of this land because they were unable to meet a nearly impossible burden of proof under 25 USC § 194—a statute never invoked in any prior reported case until this one—of prov-

ing the nature of the movements of the Missouri River occurring over a century ago.[14]

The land which the petitioner and the Tribe will recover is a far more valuable and productive piece of land than it would have been without the efforts of the respondents and their predecessors.

We find it difficult to believe that "public policy" can prevent a court of equity, in a case such as this, from ex-

---

14. 25 USC §194 states:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

The court of appeals and the district have both commented on the pivotal effect of 25 USC §194 in this litigation. The court of appeals observed:

> We recognize that to require the defendants to prove the cause of the river's movement occurring some 100 years after the event is indeed an onerous burden. This may seem to be an injustice when one considers that the defendants or their predecessors have possessed and continuously farmed the land without protest for nearly 40 years.
>
> *Omaha Indian Tribe v. Wilson*, 575 F.2d at 651.

The district court was even more emphatic:

> There can be no doubt, however, that 25 U.S.C. §194 has been a determinative factor in the outcome of this case. In the Appellate stages of this proceeding, this previously untested statute operated to shift the ordinary burden of proof in a quiet title action to the individual defendants. This enormous burden included the task of describing the nature of river movements which occurred beginning over 100 years ago. This Court firmly believes the statute thereby provided the Tribe an unconscionable advantage in this litigation. Moreover, the statute arguably operated to deprive these defendants of their constitutional right to equal protection under the law.
>
> Pet. App. 66a.

ercising its traditional equitable powers, as the court of appeals has done, to do justice to all parties by requiring that the respondents be compensated for the permanent value which they have added to the land and which will inure to the benefit of the petitioner and the Tribe.

CONCLUSION

For the reasons stated above we respectfully submit that the decision of the court of appeals in this case does not warrant review by this Court and that the Petition For A Writ Of Certiorari should be denied.

Respectfully submitted,

ROBERT J. BECKER and
DONALD J. BURESH

THOMAS R. BURKE and
LYMAN L. LARSEN

Counsel for Respondents, John R. Wilson, Charles E. Lakin, Florence Lakin and Harold Jackson

PETER J. PETERS
Council for RGP, Inc. and Otis Peterson